Supreme Court, U.S.
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Docket No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

Walter Bensch, Petitioner
vs.
Penelope Mattos, et al., Respondents

(consolidated with)

Walter Bensch, Petitioner
vs.
Penelope Mattos, et al., Respondents
Rosendo Rodriguez, Jr., Petitioner

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in *sua sponte* converting the Respondents' Amended Rule 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted and in treating the Respondents' Amended Motion to Dismiss as a Motion for Summary Judgment without giving to Petitioner Bensch the notice and opportunity to respond as provided for in Rule 56(c) of the Federal Rules of Civil Procedure and in Rules 12(b) and 12(c) of the Federal Rules of Civil Procedure, and in addition to being a statutory violation, did the failure to give notice and opportunity to respond violate and implicate Petitioner Bensch's right to due process of law as guaranteed to Petitioner Bensch by the Fifth Amendment to the United States Constitution?

2. Did the District Court, in applying the standard and analysis applicable to a Motion to Dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6)

of the Federal Rules of Civil Procedure, err in dismissing Petitioner Bensch's actions and claims?

3. Did the District Court err and commit plain error and constitutional error and abuse its discretion in misleading Petitioner Rodriguez, in its show cause order, into believing that an award of attorney's fees could be imposed as a sanction since it was not within the District Court's power, in a case involving court-initiated sanctions, to sanction Petitioner Rodriguez by making an award of attorney's fees in favor of the opposing parties, thus making the show cause order void because it purported to impose an impermissible sanction upon Petitioner Rodriguez?

PARTIES TO THE PROCEEDINGS

1 Walter Bensch, Petitioner

2. Rosendo Rodriguez, Jr., Petitioner

3. Penelope Mattos, Respondent

4. Charles Casillas, Police Officer for the City of Wichita Falls, Texas; Pat Yates, Police Officer for the City of Wichita Falls, Texas; Roy Don Wynn, Police Officer for the City of Wichita Falls, Texas; Curtis Harrelson, Chief of Police for the City of Wichita Falls, Texas; The City of Wichita Falls, Texas; Jim Berzina, City Manager for the City of Wichita Falls, Texas; Wichita Falls Police Department; Wichita Falls City Council; Respondents

5. Stephen Marsh, Attorney for Respondent Mattos

6. W. Andrew Messer, Attorney for all other Respondents

7. Honorable Joe Kendall, United States District Judge, Northern District of Texas

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A to the petition and is unpublished.

The Memorandum Opinion and Order and Final Judgment of the United States District Court for the Northern District of Texas, Wichita Falls Division, pertaining to Issues 1 & 2, appears at Appendix B to the petition and is unpublished.

The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas, Wichita Falls Division, pertaining to Issue 3, appears at Appendix C to the petition and is unpublished.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 14, 1998.

No petition for rehearing was filed in this case.

The jurisdiction over this Petition for Writ of Certiorari is conferred upon the Honorable Supreme Court of the United States by 28 USC Section 1254(1) which states that cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of an party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment Due Process Clause

...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE PERTAINING TO ISSUES 1 & 2

This is a case brought under 42 USC Section 1983 and 18 USC Section 1962(c).

Petitioner Bensch brought suit against the Respondents alleging that the Respondents subjected Petitioner Bensch to illegal arrest, illegal search, invasion of privacy, and violations of Petitioner Bensch's rights under the RICO statute. Petitioner Bensch sought actual or compensatory damages, punitive damages, attorney's fees, costs of suit, and a jury trial.

The Respondents filed an Amended Motion to Dismiss Petitioner Bensch's First Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure alleging that Petitioner Bensch's First Amended Complaint failed to state a claim upon which relief may be granted.

On May 22, 1997, the Honorable Joe Kendall, United States District Judge for the Northern District of Texas, Wichita Falls Division, dismissed Petitioner Bensch's First Amended Complaint,

after first converting the Respondents' Amended Motion to Dismiss For Failure to State a Claim into a Motion for Summary Judgment, and Judge Kendall rendered and entered a take-nothing judgment against Petitioner Bensch (Memorandum Opinion and Order and Final Judgment, Appendix B).

STATEMENT OF THE CASE PERTAINING TO ISSUE 3

The Memorandum Opinion and Order pertaining to Issue 3 was signed on September 18, 1997, filed on September 19, 1997 and entered on September 22, 1997. (Memorandum Opinion and Order, Appendix C).

As can be seen from the Memorandum Opinion and Order referred to immediately above, Petitioner Rodriguez had brought suit against Respondent Mattos and the other Respondents in behalf of Petitioner Bensch under 42 USC Section 1983 and 18 USC Section 1962(c). By Memorandum Opinion and Order and Final Judgment filed May 23, 1997, the District Court granted the

Respondents' motion and dismissed all of Petitioner Bensch's claims.

On May 27, 1997, the District Court issued an Order to Show Cause ordering Petitioner Rodriguez, as Petitioner Bensch's counsel, to appear before the District Court on July 15, 1997 to show cause why Petitioner Rodriguez should not be sanctioned for an alleged violation of Rule 11 of the Federal Rules of Civil Procedure. This was a court initiated sanction as opposed to a Motion for Sanctions filed by the parties.

The hearing was held on July 15, 1997, on the court-initiated sanctions. At the conclusion of the hearing on July 15, 1997, the District Court took the matter under advisement. The District Court handed down a Memorandum Opinion and Order, said Memorandum Opinion and Order being filed on September 19, 1997.

The District Court reprimanded Petitioner Rodriguez as a sanction and found, as a basis for the sanction, that Petitioner Rodriguez had made an insufficient legal and factual investigation

before filing suit and, additionally, that Petitioner Rodriguez had acted in bad faith.

The Honorable United States Court of Appeals for the Fifth Circuit recently decided the case of ***Thornton vs. General Motors Corporation, 136 F.3d 450 (5th Cir. 1998)*** which, to Petitioner Rodriguez's knowledge, is the first case out of the United States Court of Appeals for the Fifth Circuit that squarely deals with the issue of what the powers are of a district court when the sanctions are court-initiated under Rule 11 of the Federal Rules of Civil Procedure as opposed to sanctions initiated on the motion of a party. Clearly, in the ***Thornton vs. General Motors*** case, the Fifth Circuit has held that an award of attorney's fees is not a possible sanction when the District Court initiates sanctions on its own and therefore, Petitioner Rodriguez argues that the District Court misled him by dwelling, in its show cause order, primarily, if not exclusively, on the potential for awarding attorney's fees in favor of the opposing parties as a sanction. This is plain error and constitutional error, and the fact that the District Court ultimately

only sanctioned Petitioner Rodriguez by way of a reprimand does not resolve the issue and does not make the issue or the error a harmless one. Petitioner Rodriguez in his response to the District Court's show cause order clearly placed the District Court on notice that Petitioner Rodriguez's preparation to defend himself was only against an award of attorney's fees. The plain error and constitutional error of the District Court in its show cause order rendered the show cause order void and therefore the District Court was without jurisdiction to proceed to sanction Petitioner Rodriguez even by a reprimand.

SUMMARY OF ARGUMENT PERTAINING TO ISSUES 1 & 2

In his first point, Petitioner Bensch will argue that the District Court erred in ***sua sponte*** converting the Respondents' Amended Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted and in treating Respondents' Amended Motion to Dismiss as a Motion for Summary Judgment without giving to Petitioner Bensch notice and

opportunity to respond as provided for in Rule 56(c) of the Federal Rules of Civil Procedure and in Rules 12(b) and 12(c) of the Federal Rules of Civil Procedure, and in addition to being a statutory violation, the failure to give notice and opportunity to respond violates and implicates Petitioner Bensch's right to due process of law as guaranteed to Petitioner Bensch by the 5th Amendment to the United States Constitution.

In his second point, Petitioner Bensch will argue, assuming that the District Court erred in converting the Amended Motion to Dismiss to a Motion for Summary Judgment, that applying the standard and analysis applicable to Motions to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the District Court erred in Dismissing the Petitioner Bensch's actions and claims.

SUMMARY OF ARGUMENT PERTAINING TO ISSUE 3

Petitioner Rodriguez will argue that the District Court erred and committed plain error and constitutional error and abused its

discretion in misleading Petitioner Rodriguez, in its show cause order, into believing that an award of attorney's fees could be imposed as a sanction since it was not within the District Court's power, in a case involving court-initiated sanctions, to sanction Petitioner Rodriguez by making a award of attorney's fees in favor of the opposing parties, yet the District Court, in its show cause order, placed Petitioner Rodriguez, erroneously and unconstitutionally, on notice that the primary sanction, if not the only sanction, that Petitioner Rodriguez needed to worry about was an award of attorney's fees in favor of the opposing parties and this plain error and misleading of Petitioner Rodriguez resulted in error that requires reversal. The show cause order is void because it purported to impose an impermissible sanction upon Petitioner Rodriguez.

ARGUMENT PERTAINING TO ISSUES 1 & 2

Issue 1:

Petitioner Bensch understands that under certain circumstances, when the District Court converts a Rule 12(b)(6)

Motion to Dismiss For Failure to State a Claim Upon Which Relief Can Be Granted into a Motion for Summary Judgment, the non-moving party may be deemed to have waived the ten days notice required in Rule 56(c) of the Federal Rules of Civil Procedure as well as Rules 12(b) and 12(c) or the non-moving party may be deemed to have implicitly agreed to the conversion, or if error is found in the conversion, the error may be deemed to be harmless; however, Petitioner respectfully submits that the foregoing are not present here and are not applicable here, and proceeds to show this Honorable Court why the ***sua sponte*** conversion of the Motion to Dismiss to a Motion for Summary Judgment was improper and constitutes harmful error.

The District Court, in its Memorandum Opinion and Order, attempts to justify the conversion of Respondents' Motion to Dismiss to a Motion for Summary Judgment because Petitioner Bensch referred to the matters presented by Respondents' in Petitioner Bensch's response to Respondents' Motion to Dismiss and the District Court's assertion is that Petitioner Bensch

acquiesced or implicitly acknowledged the conversion because Petitioner Bensch referred to the matters outside the pleadings presented by Respondents. Petitioner Bensch respectfully submits that it is ridiculous to assert that Petitioner Bensch should have or could have ignored the arguments and exhibits presented in Respondents' Amended Motion to Dismiss so as to avoid a later finding by the District Court that Petitioner Bensch implicitly acknowledged the conversion.

Petitioner Bensch respectfully submits that ***Powell vs. U.S. 849 F.2d 1576 (5th Cir. 1988)*** correctly states the law pertaining to the issue at hand and should be applied here favorably to petitioner Bensch and a reversal should occur.

Issue 2:

Under the standard and analysis applicable to Motions to Dismiss, the District Court erred in dismissing Petitioner Bensch's suit.

Petitioner Bensch pled both well-pleaded facts as well as legal conclusions, supported by those facts, on the three causes of

action for illegal arrest, illegal search and invasion of privacy. The basis of liability of each Respondent, whether, direct, supervisory or as a result of an official custom or policy, was pled. Petitioner Bensch incorporated several exhibits into his First Amended Complaint and attached them as Exhibits. With respect to the RICO claims, Petitioner Bensch did the same.

A. Illegal Arrest

The District Court's analysis appears to be based on whether or not Petitioner Bensch overcame the Respondents' qualified immunity defense.

In ***Harlow vs. Fitzgerald, 457 US 800 (1982)***, the Supreme Court of the United States explicitly eliminated the element of subjective good faith in establishing the current standard for qualified immunity, a standard that focuses on the objective reasonableness of an official's conduct:

> **Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person**

would have known.

The standard also provides an exception where officials could show or can show that they neither knew nor should have known of a right, even when the right is clearly established.

In ***Malley vs. Briggs, 475 US 335 (1986)*** and ***Anderson vs. Creighton, 107 S Ct. 3034 (1987)***, the Supreme Court stated that even though the law might be clearly established as a general principle, officials could still assert qualified immunity if a reasonable officer under the same circumstances would not have known his or her conduct was illegal.

An action for false arrest and/or false imprisonment may be brought under 42 USC Section 1983 for violation of the Fourth and Fourteenth Amendments. ***Pierson vs. Ray, 386 US 547 (1967)***; ***Monroe vs. Pape, 365 US 167 (1961)***; ***Oliveira vs. Mayer, 23 F.3d 642 (2d Cir. 1994).***

An officer can only be insulated from liability by the action of a magistrate or other intermediary if he has presented all the facts to the magistrate and has not withheld or misrepresented any

material facts. ***Borunda vs. Richmond, 885 F.2d 1384 (9th Cir. 1984); Jones vs. City of Chicago, 857 F.2d 985 (7th Cir. 1988); Hand vs. Gary, 838 F.2d 1420 (5th Cir. 1988).***

Where an arrest is made under a warrant, but the warrant was secured on the basis of false statements made to the magistrate by the police officer, plaintiff should have a cause of action against the officer. ***Olson vs. Tyler, 771 F.2d 277 (7th Cir. 1985)***, but only where the false or withheld information is material to the probable cause determination. ***Cartier vs. Lussier, 955 F.2d 841 (2d Cir. 1992); Franks vs. Delaware, 438 US 154 (1978).*** In such an action, the question of whether the officers were truthful at the time they applied for the warrant will be a jury issue. ***Hindman vs. City of Paris, Texas, 746 F.2d 1063 (5th Cir. 1984).***

The Order of Dismissal issued by Justice of the Peace Little clearly sets out a factual and a legal basis for dismissal of the case against Petitioner Bensch. Judge Little's Order and factual recitations are incorporated in Petitioner Bensch's First Amended

Complaint. Petitioner Bensch believes that he overcame the defense of qualified immunity and under the test or standard of review articulated herein, as said standard of review pertains to motions to dismiss for failure to make a claim upon which relief can be granted, Petitioner Bensch's cause of action for illegal arrest should survive.

B. Illegal Search

As stated by the District Court's opinion, Petitioner Bensch's claim of illegal search encompasses three basis: that Respondent Casillas and other police officers made false assertions or representations to Judge Brotherton in the search warrant affidavit; that the police officers of the Wichita Falls Police Department that conducted the search at Petitioner Bensch's home had no jurisdiction to apply for evidentiary search warrant nor to search Petitioner Bensch's home because that location is not within the city limits and geographical limits of the City of Wichita Falls, Texas, and Petitioner Bensch's right to privacy was violated when the unreasonable search of Petitioner Bensch's home was

conducted.

In the Brief for Petitioner Bensch, Petitioner Bensch pointed out to the Honorable United States Court of Appeals for the Fifth Circuit that for the first time, in the Amended Motion to Dismiss Pursuant to Rule 12(b)(6) With Supporting Brief, Respondents indicated their reliance on consents to search executed by Petitioner Bensch as opposed to the allegedly issued evidentiary search warrant by State District Judge Robert P. Brotherton. Petitioner Bensch respectfully submits that both with respect to the illegal search issue contained herein and the illegal arrest issue addressed immediately above, this Honorable Court should apply the holding and the remedy in ***Schultea vs. Wood, 47 F.3d 1427 (5th Cir. 1995)***. There, the Fifth Circuit in a case involving qualified immunity, and in a case specifically addressing pleading problems and a Motion to Dismiss under Rule 12(b)(6), directed that the case be remanded and that the Plaintiff-Appellant be permitted to file an Amended Complaint. Petitioner Bensch respectfully submits that under the circumstances stated herein, it would be entirely proper

for this Honorable Court to remand this matter to the District Court with instructions that Petitioner Bensch be given the opportunity to amend his First Amended Complaint in conformity with ***Schultea vs. Wood.***

C. Invasion of Privacy and RICO Claims

First, Petitioner Bensch states that under the standard of review herein, Petitioner Bensch's First Amended Complaint on its face meets the standard of review to be applied on Motions to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; alternatively, Petitioner Bensch respectfully submits that applying the holding of ***Schultea vs. Wood, 47 F.3d 1427 (5th Cir. 1995)***, this Honorable Court should remand the case to the District Court with instructions that Petitioner Bensch be allowed to amend his First Amended Complaint so as to comply with ***Schultea vs. Wood***, especially since a large part of the Memorandum Opinion and Order and Final Judgment appealed herein is based on the District Court's position that Petitioner failed to overcome the defense of qualified immunity.

ARGUMENT PERTAINING TO ISSUE 3

The District Court erred and committed plain error and constitutional error and abused its discretion in misleading Petitioner Rodriguez, in its show cause order, into believing that an award of attorney's fees could be imposed as a sanction since it was not within the District Court's power, in a case involving court-initiated sanctions, to sanction Petitioner Rodriguez by making a award of attorney's fees in favor of the opposing parties, yet the District Court, in its show cause order, placed Petitioner Rodriguez, erroneously and unconstitutionally, on notice that the primary sanction, if not the only sanction, that Petitioner Rodriguez needed to worry about was an award of attorney's fees in favor of the opposing parties and this plain error and misleading of Petitioner Rodriguez resulted in error that requires reversal. The show cause order is void because it purported to impose an impermissible sanction upon Petitioner Rodriguez.

The imposition of sanctions are reviewed by an appellate court for an abuse of discretion. ***Resolution Trust Corp. vs. Bright,***

6 F.3d 336, 340 (5th Cir. 1993). A court abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. ***Cooter and Gell vs. Hart Marx Corporation, 496 U.S. 384, 405, 1102 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990)***. This is plain error and constitutional error and jurisdictional error because of the asserted voidness of the show cause order. As previously stated and as is restated herein again, the case of ***Thornton vs. General Motors Corp., 136 F.3d 450 (5th Cir. 1998)***, which was decided by the Honorable United States Court of Appeals for the Fifth Circuit on March 2, 1998, makes it absolutely clear that when the District Court proposes to sanction an attorney, on its own motion, or on court-initiated sanctions, as opposed to sanctions brought on by the motion of a party in the case, the District Court is without power to sanction the attorney in the form of an award of attorney's fees. Yet, the show cause order, pursuant to which Judge Kendall sanctioned Petitioner Rodriguez, dwells primarily, if not exclusively, on the District Court's asserted intention to award attorney's fees against

Petitioner Rodriguez and in favor of the Respondents in the District Court. The District Court clearly elicited from the Respondents proof and evidence of the attorney's fees expended in defending the case that Petitioner Rodriguez had brought in behalf of Petitioner Bensch. Nowhere did Judge Kendall apprise Petitioner Rodriguez in his show cause order that Petitioner Rodriguez had to worry about non-monetary sanctions. Petitioner Rodriguez, in his response to the show cause order, apprised the District Court of the fact that Petitioner Rodriguez was prepared to defend himself only against monetary sanctions in the form of an attorney's fees award. Apparently, Judge Kendall being aware of the problem raised in Petitioner Rodriguez's response, during the hearing, as is borne out by the court reporter's transcript of the hearing of July 15, 1997, attempted to make this issue a non-issue by observing that the show cause order stated that the District Court was considering sanctioning Petitioner Rodriguez at least to the extent of an attorney's fees award in favor of the Respondents and by means of this Judge Kendall apparently attempts to cure the obvious error.

The error was not obvious to Petitioner Rodriguez until Petitioner Rodriguez read the case of ***Thornton vs. General Motors Corp.*** well after it was handed down on March 2, 1998. Judge Kendall apparently realized the problem and the error during the hearing and attempts on the record to cure it. Petitioner Rodriguez respectfully asserts that the error is plain error and constitutional error and renders the show cause order void because it was not within the power of the District Court to sanction Petitioner Rodriguez in the form of an attorney's fees award against Petitioner Rodriguez and in favor of the Respondents. An error of this magnitude cannot be waived and is not harmless. The District Court misled Petitioner Rodriguez to Petitioner Rodriguez's great detriment and the District Court's sanction in the form of a reprimand must be reversed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

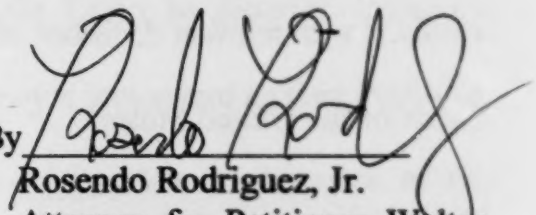
The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Additionally, the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that conflicts with relevant decisions of its own court or of the Supreme Court of the United States.

CONCLUSION

Each of the three questions presented for review present serious federal constitutional or statutory issues. Petitioner Bensch and Petitioner Rodriguez respectfully request that the Supreme Court of the United States grant certiorari so that the questions may be resolved.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-10691

WALTER BENSCH,

Plaintiff-Appellant,

versus

PENELOPE MATTOS, ET AL.,

Defendants-Appellees.

(consolidated with)

No. 97-11222

WALTER BENSCH,

Plaintiff,

versus

PENELOPE MATTOS, ET AL.,

Defendants,

ROSENDO RODRIGUEZ, JR.,

Appellant.

Appeals from the United States District Court
for the Northern District of Texas
(7:96-CV-85-X & 7:96-CV-085)

Before POLITZ, Chief Judge, JONES and DUHÉ, Circuit Judges.

PER CURIAM: *

Having considered the briefs, oral arguments of counsel, and pertinent parts of the record in these consolidated appeals, and finding no basis for reversible error, the rulings appealed are AFFIRMED.

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

WALTER BENSCH,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Case No. 7:96-CV-085-X
	§	
PENELOPE MATTOS, et al,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Defendants Charles Casillas, Pat Yates, Richard Ulrich, Roy Don Wynn, Curtis Harrelson, Jim Berzina, the Wichita Falls Police Department, the City Council for the City of Wichita Falls, and the City of Wichita Falls, Texas (the "City Defendants") Amended Motion to Dismiss, filed January 30, 1997; Plaintiffs' Response, filed February 19, 1997; and Defendants' Reply, filed March 14, 1997. For the reasons set forth below, the Motion is GRANTED, and all of te Plaintiff's claims against the Defendants are DISMISSED.

BACKGROUND

Plaintiff, a former Wichita County deputy sheriff, filed his 37 page First Amended Complaint in April 1996. Plaintiff has sued his ex-wife, Defendant Penelope Mattos, four Wichita Falls police officers, the chief of the Wichita Falls police department, the City Manager of the City of Wichita Falls, the Wichita Falls police department, the City Council for the City of Wichita Falls, and the City of Wichita Falls, Texas for an illegal arrest and illegal search pursuant to 42 U.S.C. § 1983 and for RICO[1] violations, seeking $28 million in damages. Plaintiff was arrested for aggravated sexual assault in connection with the alleged sexual molestation of his daughter and son.

The City Defendants (all defendants with the exception of Ms. Mattos) move to dismiss the allegations in the First Amended Complaint. The Court can only conclude from perusing the First Amended Complaint that Plaintiff has sued as many defendants

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[1]The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*

as possible, throwing as many claims as possible against the wall to see if any stick. None do.

The City Defendants have presented matters outside the pleadings as exhibits to their motion to dismiss. The Plaintiff has likewise referred the Court to those exhibits,[2] implicitly acknowledging that the motion would be treated as a motion for summary judgment. When, in a motion to dismiss under Rule 12(b)(6), a court is presented with matters outside the pleadings and the court does not exclude such matters, the court shall treat the motion to dismiss as a motion for summary judgment. Rule 12(b), Fed. R. Civ. P.; *Isquith v. Middle South Utilities*, 847 F.2d 186, 193-96 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988).

SUMMARY JUDGMENT

Summary judgment is proper when the pleadings and evidence illustrate that no genuine issue exists as to any material fact and that the movant is entitled to judgment or partial

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[2]Plaintiff's Response to Defendants' Amended Rule 12(b)(6) Motion to Dismiss at 3.

judgment as a matter of law. Fed. R. Civ. P. 56(c); *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 170 (5th Cir. 1991). Disputes concerning material facts are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) (quoting *Anderson v. Liberty Lobby, Inc.*, 488 U.S. 242, 248 (1986)). Substantive law provides that an issue is "material" if it involves a fact that might affect the outcome of the suit under the governing law. *Burgos v. Southwestern Bell Telephone Co.*, 20 F.3d 633, 635 (5th Cir. 1994); *Anderson*, 477 U.S. at 248. The nonmovant is not required to respond to the motion until the movant properly supports his motion with competent evidence. *Tubacex, Inc. v. M/V Risan*, 45 F.3d 941, 954 (5th Cir. 1995); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, once the movant has carried his burden of proof, the nonmovant may not sit idly by and wait for trial. *Page v. DeLaune*, 837 F.2d 233, 239 (5th Cir. 1988).

When a movant carries his initial burden, the burden then

shifts to the nonmovant to show that the entry of summary judgment is inappropriate. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992); *Celotex*, 477 U.S. at 322-24. Although the nonmovant may satisfy this burden by tendering depositions, affidavits, and other competent evidence; "conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden," *Douglass*, 79 F.3d at 1429, as "the adverse party's response...must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Merely colorable evidence or evidence not significantly probative, however, will not defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 249-50. Furthermore, a mere scintilla of evidence will not defeat a motion for summary judgment. *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994); *Anderson*, 477 U.S. at 252.

Summary judgment evidence is viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters*, 5 F.3d 119, 123 (5th Cir. 1993); *Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 586 (1986). In addition, factual controversies are resolved in favor of the nonmovant, but only when both parties have submitted evidence of contradictory facts, thus creating an actual controversy. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). In the absence of any proof, however, the Court does not assume that the nonmovant could or would prove the necessary facts. *Id.*

In making its determination on the motion, the Court looks at the full record including the pleadings, depositions, answers to interrogatories, admissions, and affidavits. Fed. R. Civ. P. 56(c); *Williams v. Adams*, 836 F.2d 958, 961 (5th Cir. 1988). However, the Court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. The movant's motion for summary judgment will be granted if he meets his burden and the nonmovant fails to make the requisite showing that a genuine issue exists as to any material fact. Fed. R. Civ. P. 56(c); *Campbell v. Sonat Offshore Drilling*, 979 F.2d 1115, 1119 (5th

Cir. 1992).

DISCUSSION

The Court begins by dismissing all of the claims and parties that plaintiff concedes should be dismissed "after reading Defendants' legal authorities."[3] First, Plaintiff agrees that the individual defendants should be dismissed in their official capacities. Plaintiff also agrees that the Wichita Falls police department is an improper party defendant because it has no corporate entity separate from its municipality. *Darby v.*

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[3]Plaintiff's Response at 14. The time to read the relevant legal authorities is before a complaint is filed and defendants are forced to incur legal fees defending meritless claims.

Rule 11, Fed. R. Civ. P., states in relevant part:

(B) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(2) the claims, defenses, and other legal contentions therein are warranted by exiting law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

It is obvious to the Court from reviewing the numerous matters that Plaintiff concedes have no valid legal basis that Plaintiff's counsel failed to fulfill his Rule 11 responsibilities before filing the Original Complaint or First Amended Complaint in this case.

Pasadena Police Dept., 939 F.2d 311, 313 (5th Cir. 1991).[4]

Plaintiff also agrees that his claim for punitive damages against the City of Wichita Falls, the City Council of the City of Wichita Falls, the Wichita Falls police department, and all individual defendants sued in their official capacities should be dismissed. Plaintiff also agrees that the City Council of the City of Wichita Falls should be dismissed as a party defendant to the RICO claim because the City Council is not a person, cannot form the requisite criminal intent, and is not subject to treble damages. Finally, Plaintiff agrees that the City Council of the City of Wichita Falls is absolutely immune from suit while acting in its legislative capacity. All of the foregoing claims and/or defendants are hereby DISMISSED.

Section 1983 Claims

To state a cause of action under 42 U.S.C. § 1983, a

[4]This is also true of the City Council of the City of Wichita Falls; thus, every claim that Plaintiff does not voluntarily dismiss against the City Council is DISMISSED as well.

plaintiff must allege that some person, acting under color of state law, has deprived him of a federal right. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). As Plaintiff explains in his response to the motion to dismiss, Plaintiff's claim of an illegal search encompasses three bases: that Defendant Casillas and other police officers made false assertions or representations to Judge Brotherton in the Search Warrant Affidavit; that the police officers of the Wichita Falls police department that conducted the search of Plaintiff's home had no jurisdiction to apply for the evidentiary search warrant nor to search Plaintiff's home (at 2006 Turtle Creek Road) because that location is not within the city limits and geographical limits of the City of Wichita Falls, Texas; and Plaintiff's right to privacy was violated when the unreasonable search of Plaintiff's home was conducted.

Of the five searches conducted, Plaintiff complains only about the search at one residence. This complaint is utterly groundless. First, it is well established in Texas law that city police officers have county-wide jurisdiction to arrest offenders,

Angel v. State, 740 S.W.2d 727, 736 (Tex. Crim. App. 1987), to conduct criminal investigations, *Landrum v. State*, 751 S.W.2d 530, 531-32 (Tex. App.--Dallas 1988) pet ref'd), and to execute search warrants, *Britt v. State*, 768 S.W.2d 514, 515 (Tex. App.--Fort Worth 1989, no pet.). Tex. Loc. Gov't Code Ann. § 341.001(e); Tex. Code Crim. Proc. ann. Art. 15.06.

Plaintiff's constitutional claim of violation of privacy likewise fails. Plaintiff (a deputy sheriff) signed a consent to search form dated September 13, 1995 that declared that he freely and voluntarily waived his constitutional rights (including the right to refuse to consent to the search) and that he gave the consent of his own free will. A search authorized by consent is constitutionally permissible and wholly valid, and may be conducted without either probable cause or a warrant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973); *United States v. Rico*, 41 F.3d 495, 507-08 (5th Cir.), *cert. denied*, 116 S.Ct. 220 (1995). Finally, Plaintiff's challenge to the obtaining of the search warrant by the police officers fails because

the search warrant was never executed because Plaintiff consented to the search. Even giving Plaintiff the benefit of the higher standard of dismissal rather than of summary judgment, Plaintiff has failed to state a claim of illegal search for which relief can be granted under § 1983.

After Plaintiff's voluntary dismissal of the claims and parties above, the remaining § 1983 claim for illegal arrest is against the individual defendants in their individual capacities and the City of Wichita Falls. The individual defendants assert the defense of qualified immunity. A public official's conduct is protected by qualified immunity if it was objectively reasonable in light of legal rules that were clearly established at the time of the action. *Hale v. Townley*, 45 F.3d 194, 919 (5th Cir. 1995). The threshold inquiry in examining a defendant's claim of qualified immunity is whether the plaintiff alleged the violation of a clearly established constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). If the plaintiff has alleged a constitutional violation, the next step is to decide if the right was clearly

established at the time the challenged conduct occurred and whether the defendant's conduct was objectively reasonable. *Hale* at 917.

As described in his response to the motion to dismiss, the crux of the Plaintiff's claim for illegal arrest is that police officer Defendant Casillas procured an arrest warrant from Justice of the Peace Michael Little by making two false assertions in the Affidavit for Arrest Warrant. Of the numerous allegations in the four paragraphs of information in the Affidavit, it was subsequently discovered that two of the allegations were untrue: two videotapes of a nude female were in fact of another female and not Plaintiff's daughter. Judge Little subsequently dismissed the case against plaintiff on the understanding that the case would be further reviewed by the Wichita County District Attorney's Office and presented to the Wichita County Grand Jury.

"In order to constitute a constitutional violation sufficient to overcome the qualified immunity of an arresting officer, the material misstatements and omissions in the warrant affidavit

must be of such character that no reasonable official would have submitted it to a magistrate." *Morin v. Caire*, 77 F.3d 116, 122 (5th Cir. 1996). In order to support an arrest warrant, the affidavit must show probable cause that an offense has been committed and probable cause that the person named in the affidavit committed the offense. Tex. Code Crim. Proc. Ann. art. 15.05; *Belton v. State*, 900 S.W.2d 886, 893 (Tex. App.--El Paso 1995, pet. ref'd).

An examination of the Affidavit for Arrest Warrant (excised of the two challenged allegations) reveals that the informants were Plaintiff's children, the victims of the crime; that Plaintiff's daughter told Casillas that plaintiff had had sexual contact with her since she was eleven years old; had shown her pornographic videos and magazines, had videotaped her nude while she was sunbathing, had showed her a vibrator, that she had performed oral sex on Plaintiff and he had performed oral sex on her, and that plaintiff made her swear on a Bible not to tell anyone. The search of Plaintiff's residence revealed pornographic magazines, an empty vibrator box, videotapes, and a Bible. The

Plaintiff's allegations regarding the Affidavit for Arrest Warrant supporting his arrest for aggravated sexual assault clearly do not rise to the level that no reasonable official would have submitted the affidavit to a magistrate. Plaintiff has failed to raise a genuine issue of material fact sufficient to overcome Defendant Casillas' defense of qualified immunity.

Plaintiff's allegations against Defendant Casillas' superiors, Defendants Yates, Ulrich, Wynn, Harrelson, and Berzina, are essentially claims of failure to train and supervise Casillas.[5] Supervisory officials may be held liable under § 1983 only if: 1) they affirmatively participate in acts that cause constitutional deprivation; or 2) they implement unconstitutional policies that causally result in the plaintiff's injury. *Baker v. Putnal*, 75 F.3d 190, 199 (5th Cir. 1996). As the Plaintiff has failed to show that Casillas acted in any way to violate Plaintiff's constitutional rights, Plaintiff has not overcome the qualified

[5]Plaintiff's Response at 6.

immunity defense of Defendants Yates, Ulrich, Wynn, Harrelson, and Berzina.

Finally, although the City of Wichita Falls does not enjoy qualified immunity, the Court concludes that Plaintiff has failed to demonstrate a violation of a constitutional right for which the City may be held accountable under § 1983. Plaintiff alleges that the City had a custom or policy of making false arrests, evidenced by the "Request for Dismissal of Case" forms concerning himself and two other men attached to his First Amended Complaint. The arrest of Danny Castillo occurred on April 4, 1991, Plaintiff's arrest occurred on September 14, 1995, and the arrest of Mark Duane Slade occurred October 19, 1995.

The City of Wichita Falls cannot be held vicariously liable for the actions of its employees under § 1983; municipal liability inures only when the execution of the City's official policy or custom causes a person to be deprived of a federally protected right. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). "Official policy" has been defined by the Fifth

Circuit as:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (en banc). Municipal liability under § 1983 only attaches where a deliberate choice to follow a course of action is made from among various alternative by city policy-makers. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

Aside from the conclusory allegations in the First Amended Complaint, Plaintiff's only evidence of an official

policy or custom by the City to make illegal arrests is the request for dismissal of Plaintiff's case and the cases of two others. The arrest of Mark Duane Slade occurred after Plaintiff's arrest, and is not relevant to whether the City had an official policy or custom to make illegal arrests at the time Plaintiff was arrested. Even if Plaintiff's arrest and the arrest of Danny Castillo four years prior to it were illegal, however, "[i]solated violations are not the persistent, often repeated constant violations that constitute custom and policy" as required for municipal liability under § 1983. *Campbell v. City of San Antonio*, 43 F.3d 973, 977 (5th Cir. 1995), *quoting Bennett v. City of Slidell*, 728, F.2d 762, 768 n.3 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985). Plaintiff has failed to raise a genuine issue of material fact that any official policy or custom to infringe Plaintiff's constitutional rights was adopted or continued by the policy-makers of the City of Wichita Falls in "deliberate indifference to the constitutional rights of its inhabitants." *City of Canton* at 392.

RICO Claim

Plaintiff's 15 pages of RICO allegations in his First Amended Complaint are hopelessly convoluted. As the Fifth Circuit has described it, the pleading does "not state a RICO claim against defendants with sufficient intelligibility for a court or opposing party to understand whether a valid claim is alleged and if so what it is." *Old Time Enterprises, Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1218 (5th Cir. 1989). Plaintiff claims that the "command authority" of the Wichita Falls police department and the City of Wichita Falls conducted or participated, directly or indirectly, in the conduct of the enterprise's (the City of Wichita Falls and the Wichita Falls police department) affairs through a pattern of racketeering activity in violation of RICO. As predicate acts, Plaintiff points to theft, tampering with government records, official oppression, mail fraud, wire fraud, and false arrest.

Under the civil RICO statute, a violation of § 1962(c) "requires (1) conduct (2) of an enterprise (3) through a pattern (4)

of racketeering activity." *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 424 (5th Cir. 1987), *quoting Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). A plaintiff must have been injured "in his business or property by reason of" a predicate act or acts which constitute a violation of RICO § 1962. 18 U.S.C. § 1964(c). The defendants' predicate acts must constitute both a factual and proximate cause of the plaintiff's alleged injury. *Whalen v. Carter*, 954 F.2d 1087, 1091 (5th Cir. 1992).

Although Plaintiff fails to properly plead a RICO cause of action in any respect, the Court focuses on the necessary element of injury "in his business or property" proximately caused by the alleged predicate acts. Plaintiff seeks damages for "false arrest, incarceration, humiliation, defamation, mental anguish and emotional distress, loss of employment, loss of enjoyment of life, posting of a $50,000 bail bond and deprivation of the use and enjoyment of this money" and attorney's fees to defend himself

against the criminal charges.[6] Plaintiff has merely attempted to characterize a tort claim for false arrest (not a predicate act under RICO) as a RICO violation. Damages for personal or emotional injuries and the pecuniary losses incurred therefrom are not recoverable under RICO. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991); *Bast v. Cohen, Dunn & Sinclair, P.C.*, 59 F.3d 492, 495 (4th Cir. 1995); *Doe v. Roe*, 958, 958 F.2d 763, 767 (7th Cir. 1992).

The remaining claim of loss of employment fares no better. The Court is surprised that Plaintiff's response to the motion to dismiss states that Plaintiff was fired by his employer, the Wichita County Sheriff, when the evidence demonstrates (and Plaintiff acknowledges in his First Amended Complaint) that Plaintiff resigned his job. Even if Plaintiff had been fired, however, such loss would not be recoverable as damages under RICO. *Cullom*

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[6]First Amended Complaint at 35.

v. Hibernia Nat'l Bank, 859 F.2d 1211, 1217 (5th Cir. 1988).

Defendant Penelope Mattos

Although the motion to dismiss does not include Ms. Mattos, a district court may dismiss a complaint on its own motion for failure to state a claim. *Shawnee Int'l, N.V. v. Hondo Drilling Co.*, 742 F.2d 234, 236 (5th Cir. 1984). Plaintiff's claims against his ex-wife fall solely under 42 U.S.C. § 1983.

Plaintiff alleges that Mattos maliciously, willfully, knowingly and intentionally made a false complaint to the Wichita Falls police department alleging that Plaintiff sexually molested their two children. "Defendant Mattos had the evil and malicious motive and unconstitutional goal of denying to Plaintiff Bensch his legal rights to his children, as well as to destroy Plaintiff Bensch's position as a Deputy Sheriff for the Wichita County Sheriff's Department."[7] Plaintiff's remaining allegations against Mattos are that her liability is predicated upon her willful

[7]First Amended Complaint at 8.

and malicious instigation of the false and fraudulent investigation of Plaintiff and that "Mattos is alleged to have been acting under color of law because she was acting in concert and participation with Defendant Casillas and other defendant police officers herein and they all shared a common unconstitutional goal."[8]

A private party may be held liable under § 1983 if she is a "willful participant in joint activity with the State or its agents." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). To support his conspiracy claims, Plaintiff must allege facts that suggest: 1) an agreement between the private and public defendants to commit an illegal act, and 2) an actual deprivation of constitutional rights. *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir.), *cert. denied*, 513 U.S. 868 (1994). The First Amended Complaint fails to state a factual basis to support the conspiracy claim. Mere conclusory allegations of conspiracy cannot, absent reference to material facts, state a claim of federal conspiracy

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[8]First Amended Complaint at 13.

under 42 U.S.C. § 1983. *Hale v. Harney*, 786 F.2d 688, 690 (5th Cir. 1986); *Young v. Biggers*, 938 F.2d 565 (5th Cir. 1991). Even if Plaintiff had properly stated a conspiracy claim, however, as all of the state actors have been determined to be entitled to qualified immunity, Plaintiff's conspiracy claim against Mattos is not actionable. *Hale v. Townley*, 45 F.3d 914, 920-21 (5th Cir. 1995). Plaintiff's claims against Defendant Penelope Mattos are hereby DISMISSED.

CONCLUSION

For the reasons discussed above, the City Defendants' motion to dismiss, considered as a motion for summary judgment, is GRANTED, and all of the Plaintiff's claims against the Defendants are DISMISSED.

SO ORDERED this 22nd day of May, 1997.

/s/ Joe Kendall
Joe Kendall
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

WALTER BENSCH,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Case No. 7:96-CV-085-X
	§	
PENELOPE MATTOS, et al,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

By separate Memorandum Opinion and Order filed today, it is ORDERED and ADJUDGED that Walter Bensch take nothing by this action and that his complaint be DISMISSED with prejudice. Costs of court as calculated by the clerk of court are taxed against Plaintiff.

SO ORDERED this 22nd day of May, 1997.

/s/ Joe Kendall
Joe Kendall
U.S. District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

WALTER BENSCH,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Case No. 7:96-CV-085-X
	§	
PENELOPE MATTOS, et al,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

On May 27, 1997, the Court issued an Order to Show Cause so that Plaintiff's counsel, Rosendo Rodriguez ("Rodriguez"), could show cause why he should not be sanctioned for violations of Rule 11(c)(1)(B), Fed. R. Civ. P. From the Court's review and analysis of this case conducted during the preparation of a Memorandum Opinion and Order granting summary judgment in favor of the Defendants on all of the Plaintiff's claims, it appeared to the Court that Rodriguez made an insufficient legal and factual investigation before filing this lawsuit. After receiving Rodriguez's response to the Order to

Show Cause, the Court held a hearing on July 15, 1997, at which time the Court heard argument from Rodriguez and from Defendants' counsel. The Court hereby issues its findings and conclusions with respect to the issue of Rodriguez's violation of Rule 11.

BACKGROUND

In April 1996 Rodriguez filed a 37 page First Amended Complaint on behalf of his client, Plaintiff Walter Bensch, a former Wichita County deputy sheriff. Bensch sued his ex-wife, Defendant Penelope Mattos, four Wichita Falls police officers, the chief of the Wichita Falls Police Department, the City Manager of the City of Wichita Falls, the Wichita Falls Police Department, the City Council for the City of Wichita Falls, and the City of Wichita Falls, Texas for an illegal arrest and illegal search pursuant to 42 U.S.C. § 1983 and for RICO[1] violations, seeking $28 million in damages. Bensch was arrested on an arrest

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[1]The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*

warrant for aggravated sexual assault in connection with the alleged sexual molestation of his daughter and son.

The City Defendants (all defendants with the exception of Mattos) moved to dismiss the allegations in the Amended Complaint. The Court commented in its Memorandum Opinion and Order that Bensch "sued as many defendants as possible, throwing as many claims as possible against the wall to see if any stick. None do." The Amended Complaint would have made any conspiracy theorist proud, layering inference upon inference and conclusory allegation upon conclusory allegation, claiming that virtually everyone in a position of authority in Wichita Falls was out to get Bensch, and had engaged in an elaborate conspiracy which culminated in Bensch's false arrest for a terrible crime.

Because the City Defendants presented matters outside the pleadings as exhibits to their motion to dismiss and Bensch likewise referred the Court to those exhibits, the Court treated the motion to dismiss as a motion for summary judgment. By Memorandum Opinion and Order filed May 23, 1997, the Court

granted the Defendants' motion and dismissed all of Bensch's claims. Bensch has appealed that order and judgment to the Fifth Circuit. The question of whether Rodriguez violated Rule 11 by filing this lawsuit is before the Court today.

DISCUSSION

Rule 11(b) of the Federal Rules of Civil Procedure provides that by presenting to the court a pleading, motion, or other paper, an attorney is certifying to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by exiting law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The central purpose of Rule 11 is to deter baseless filings in district court and thus streamline the administration and procedure of the federal courts. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). To achieve this purpose, Rule 11 provides "a means by which litigants certify to the court, by signature, that any papers filed are well grounded." *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 542 (1991).

In determining whether an attorney has made a reasonable inquiry into the law, the Court may consider: the time available to

the attorney to prepare the document; the plausibility of the legal view contained in the document; the *pro se* status of the litigant; and the complexity of the legal and factual issues raised. The determination of whether an attorney has made a reasonable inquiry into the facts of the case depends, of course, on the particular facts, but the Court may consider such factors as: the time available to the signer for investigation; the extent of the attorney's reliance upon the client for the factual support for the document; the feasibility of a pre-filing investigation; whether the signing attorney accepted the case from another member of the bar or a forwarding attorney; the complexity of the factual and legal issues; and the extent to which development of the factual circumstances underlying the claim requires discovery. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 875-76 (5th Cir. 1988).

When Rule 11 has been violated, the Court must carefully choose sanctions that foster the appropriate purpose of the rule, depending upon the parties, the violation, and the nature of the

case. *Thomas* at 877. The sanction imposed should be the least severe sanction that would adequately deter an attorney from violating the rule. *Id.; Merriman v. Security Ins. Co. Of Hartford*, 100 F. 3d 1187, 1194 (5th Cir. 1996). Appropriate sanctions might include monetary sanctions, admonishment or a reprimand, or requiring some form of legal education. *Thomas* at 877-78.

Insufficiency of Rodriguez's Legal Investigation Before Filing Suit

What prompted the Court to initiate this Rule 11 inquiry was Rodriguez's candid admission in his response to Defendants' motion to dismiss that numerous claims that he had brought and parties that he sued should be dismissed "after reading Defendants' legal authorities."[2] As the Court pointed out in its Memorandum Opinion and Order, the time to read the relevant legal authorities is *before* a complaint is filed and defendants are forced to incur legal fees defending meritless claims. Specifically, Rodriguez conceded that:

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[2]Plaintiff's Response at 14.

1) the individual defendants should be dismissed in their official capacities as redundant because the City was sued as well;

2) the Wichita Falls Police Department is an improper party defendants, as it has no corporate identity separate from its municipality;

3) claims for punitive damages against the City of Wichita Falls, the City Council of Wichita Falls, the Wichita Falls Police Department, and all individual defendants sued in their individual capacities should be dismissed, as local governments are immune from punitive damages;

4) the City Council of Wichita Falls should be dismissed as a party defendant to the RICO claim, as the City Council is not a person, cannot form the requisite criminal intent, and is not subject to treble damages; and

5) the City Council of the City of Wichita Falls is

absolutely immune from suit while acting in its legislative capacity.

The filing of so many admittedly baseless claims belies the possibility that Rodriguez conducted a reasonable inquiry into the relevant law as mandated by Rule 11.[3]

The claims that Rodriguez did not immediately concede were legally groundless fared no better. Rodriguez asserted a cause of action under 42 U.S.C. § 1983 claiming an illegal search and illegal arrest. As discussed at length in the Memorandum Opinion and Order, none of Rodriguez's three bases for claiming illegal search was valid. Rodriguez claimed that the police officers had no jurisdiction to search one of Bensch's homes because that location is not within the geographical limits of Wichita Falls, disregarding well-established state law that in

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[3]Rodriguez's concession that these claims should be dismissed provides him no shelter under the Rule 11"safe harbor" provision of 11(c)(1)(A); that provision applies only to a motion for sanctions, and not court initiated sanctions. *See* Fed. R. Civ. P. 11 Advisory Committee's Note (1993 Amendment); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995).

Texas, city police officers have county-wide jurisdiction to arrest offenders, to conduct criminal investigations, and to execute search warrants. Rodriguez claimed that Bensch's right to privacy was violated when the unreasonable search of his home was conducted, ignoring the fact that Bensch (a deputy sheriff) signed a consent to search form explicitly consenting to the search and voluntarily waiving his constitutional rights. Finally, Rodriguez's challenge to the obtaining of the search warrant by the police officers failed because the search warrant was never executed as Bensch consented to the search.

The § 1983 claim of illegal arrest was pled against the individual defendants in their individual capacities and the City of Wichita Falls. The individual defendants asserted the defense of qualified immunity. The crux of Plaintiff's claim for illegal arrest is that police officer Defendant Casillas procured an arrest warrant from Justice of the Peace Michael Little by making two false assertions in the Affidavit for Arrest Warrant. Of the numerous allegations in the four paragraphs of information in the

Affidavit, it was subsequently discovered that two of the allegations were inaccurate: two videotapes of a nude female alleged to be Bensch's daughter were in fact of another female. Judge Little subsequently canceled the arrest warrant against Bensch after being contacted by the Wichita County District Attorney's office on the understanding that the case would be referred to and further reviewed by the Wichita County District Attorney's office and presented to the Wichita County Grand Jury. The Wichita County District Attorney typically represents the County and the Sheriff in § 1983 actions.

An examination of the Affidavit for Arrest Warrant (excised of the two challenged allegations) revealed that the informants were Bensch's children, the victims of the crime; that Bensch's daughter told Casillas that Bensch had been having sexual contact with her since she was eleven years old, had shown her pornographic videos and magazines, had videotaped her nude while she was sunbathing, had showed her a vibrator, that she had performed oral sex on Bensch and he had performed oral sex on

her, and that Bensch made her swear on a Bible not to tell anyone. The search of Bensch's residence revealed pornographic magazines, an empty vibrator box, videotapes, and a Bible. The Court concluded that the allegations regarding the Affidavit for Arrest Warrant supporting Bensch's arrest for aggravated sexual assault clearly did not rise to the level such that no reasonable official would have submitted the affidavit to a magistrate, which was the standard necessary to overcome the officer's defense of qualified immunity.[4] The allegations against officer Casillas' superiors, Defendants Yates, Ulrich, Wynn, Harrelson, and

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[4]In fact, the affidavit contained more than enough facts, even absent the information about the videotapes, to support a finding of probable cause to issue an arrest warrant. For one thing, the fact they didn't find the tapes alleged but found other similar ones is no proof the others didn't or don't exist. The cancellation (or "dismissal") of the arrest warrant by Judge Little on September 20, 1995 implicitly demonstrates he *never* (even after the arrest warrant and search) changed his view that probable cause existed.

From the face of the document, *which Rodriguez had*, it is clear Judge Little's actions were based on *assurances* (his word) by the Wichita Falls District Attorney's office that the matter was going to be referred to the grand jury, a common occurrence when a law enforcement officer is charged, obviating the need to make the officer pay a bail bondsman. It is patent that a withdrawal of an arrest warrant and substitution of a grand jury referral doesn't end the potential prosecution, much less equate to a false arrest.

Berzina, were essentially claims of failure to train and supervise Casillas.[5] It is elementary that supervisory officials may be held liable under § 1983 only if they affirmatively participate in acts that cause constitutional deprivation or they implement unconstitutional policies that causally result in the plaintiff's injury. As Rodriguez had failed to show that Casillas acted in any way to violate Bensch's constitutional rights, the Court determined that Rodriguez had not overcome the supervisors' qualified immunity defense.

Although the City of Wichita Falls does not enjoy qualified immunity, the Court concluded that Rodriguez failed to demonstrate a violation of a constitutional right for which the City may be held accountable under § 1983. Rodriguez alleged that the City had a custom or policy of making false arrests. Aside from the conclusory allegations in the First Amended Complaint, the only "evidence" of an official policy or custom by the City to

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[5]Plaintiff's Response at 6.

make illegal arrests is the request for dismissal of Bensch's case and the cases of two others spanning five years. This is insufficient to establish Rodriguez's alleged custom or policy, as there could be any number of reasons why a district attorney would seek dismissal of a case besides a false arrest, and Rodriguez has given the Court no reason to prefer is theory over any other possible explanation. Only one of the other dismissed cases submitted as evidence occurred before Bensch's arrest. Isolated violations are the persistent, often repeated constant violations that constitute custom and policy as required for municipal liability under § 1983, and the Court determined that Rodriguez failed to raise a genuine issue of material fact that any official policy or custom to infringe Bensch's constitutional rights was adopted or continued by the policy-makers of the City of Wichita Falls in deliberate indifference to the constitutional rights of its citizens.

Turning to the RICO claim, the Court described, and still describes, Rodriguez's 15 pages of RICO allegations int he First

Amended Complain as "hopelessly convoluted" and unintelligible. Rodriguez claimed that the "command authority" of the Wichita Falls police department and the City of Wichita Falls conducted or participated, directly or indirectly, in the conduct or the enterprise's (the City of Wichita Falls and the Wichita Falls Police Department) affairs through a pattern of racketeering activity in violation of RICO. As predicate acts, Rodriguez pointed to theft, tampering with government records, official oppression, mail fraud, wire fraud, and false arrest.

Under the civil RICO statute, a violation of § 1962 requires conduct of an enterprise through a pattern of racketeering activity, and a plaintiff must have been injured "in his business or property by reason of" a predicate act or acts which constitute a violation of RICO § 1962. Rodriguez asked for damages for "false arrest, incarceration, humiliation, defamation, mental anguish and emotional distress, loss of employment, loss of enjoyment of life, posting of a $50,000 bail bond and deprivation of the use and enjoyment of this money" and attorney's fees for Bensch to

defend himself against the criminal charges.[6] The Court determined that Rodriguez had merely attempted to characterize a tort claim for false arrest (not a predicate act under RICO) as a RICO violation. As Rodriguez should have known, damages for personal or emotional injuries and the pecuniary losses incurred therefrom are not recoverable under RICO. The Court also pointed out that as for the claim of loss of employment, although Rodriguez's response to the motion to dismiss states that Bensch was *fired* by his employer, the Wichita County Sheriff, the evidence demonstrated (and Rodriguez acknowledged in the First Amended Complaint) that Bensch had in fact *resigned* his job. Rodriguez admitted at the hearing that he dictated the statement that Bensch was fired in haste, and agreed that Bensch had resigned.[7]

The Court is particularly disturbed at the complete lack of legal foundation of the RICO claim. The Fifth Circuit views an

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[6]First Amended Complaint at 35.

[7]Transcript of the July 15, 1997 hearing [hereinafter Tr.] at 46.

attorney's duty under Rule 11 as particularly important in RICO cases:

> Given the resulting proliferation of civil RICO claims and the potential for frivolous suits in search of treble damages, greater responsibility will be placed on the bar to inquire into the factual and legal bases of potential claims or defenses prior to bringing such suit or risk sanctions for failing to do so.

Smith v. Our Lady of the Lake Hospital, Inc., 960 F.2d 439, 444 (5th Cir. 1992) (quoting Black & Magenheim, Using the RICO Act in Civil Cases, 22 Hou. Law. 20, 24-25 (Oct. 1984)). RICO violations are extremely serious, and allegations of the same should not be thrown about lightly. Although a claim of this nature is harmful enough when no ascertainable facts exist to give it substance, the harm is only exacerbated by the nature of the defendants as public officials and a governing body. Rodriguez admitted that he erroneously sued the City Council of the City of Wichita Falls for RICO violations, but has stubbornly refused to acknowledge that his claims that the City of Wichita Falls and the Wichita Falls Police Department engaged in a pattern of

racketeering activity are just as meritless. Perhaps Rodriguez has forgotten that respect for governmental bodies derives from the public trust. Allegations can by themselves be harmful to this trust, even if later revealed to be groundless. This is especially true when, as here, the very name of the statute sued under speaks of moral turpitude, i.e., *racketeering, corruption*, etc.

Finally, the Court dismissed the claim under § 1983 against Bensch's ex-wife, Penelope Mattos, for failure to state a claim. Rodriguez alleged that Mattos maliciously, willfully, knowingly and intentionally made a false complaint to the Wichita Falls Police Department claiming that Bensch sexually molested their two children. "Defendant Mattos had the evil and malicious motive and unconstitutional goal of denying to Plaintiff Bensch his legal rights to his children, as well as to destroy Plaintiff Bensch's position as a Deputy Sheriff for the Wichita County Sheriff's Department."[8] Rodriguez's remaining allegations

[8]First Amended Complaint at 8.

against Mattos were that her liability was predicated upon her willful and malicious instigation of the false and fraudulent investigation of Bensch and that "Mattos is alleged to have been acting under color of law because she was acting in concert and participation with Defendant Casillas and other defendant police officers herein an they all shared a common unconstitutional goal."[9] At the sanctions hearing Rodriguez admitted he had made no pre-filing investigation of the factual basis for those claims and could point the Court to no evidence of these wild assertions.

Rodriguez's submission of completely baseless § 1983 claims is particularly puzzling given the fact that Rodriguez told the court at the hearing that he practices "a lot" in § 1983 law.[10] Rodriguez attends annually the seminar that he believes is the most authoritative nationwide in this area of the law, taught by Professor Sheldon Nahmod at the Chicago-Kent School of Law whom Rodriguez considers the foremost authority in the nation in

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[9]First Amended Complaint at 13.

[10]Tr. at 11.

§ 1983 law.[11] In fact, Rodriguez attended the 1996 seminar just two weeks prior to filing this lawsuit.[12] If anything, this makes Rodriguez's conduct all the more egregious. Certainly attending highly regarded CLE seminars is admirable, but that is no substitute for researching Fifth Circuit law before filing a lawsuit, which Rodriguez conceded that he failed to do.[13]

Rodriguez's Failure to Show Appropriate Cause for his Conduct at the Hearing

The Court spent considerable time at the hearing questioning Rodriguez about the extent of the factual investigation he conducted before filing this lawsuit, and what facts existed to support the legal claims asserted in the First Amended complaint. Rodriguez seemed incapable of giving the Court straight answers to simple, direct question. After the

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[11]Professor Nahmod is indeed such an expert and is a frequent lecturer at seminars for federal judges concerning § 1983 presented by the Federal Judicial Center. This Court has attended several of Professor Nahmod's excellent presentations.

[12]Tr. at 11.

[13]Tr. at 12.

hearing, the only conclusion open to the court is that Rodriguez's factual investigation, required by Rule 11, was wholly inadequate.

To assert a claim against a person or entity in the notice pleading system as codified in the Federal Rules of Civil Procedure, the complaint must be sufficient to put the defendant on notice of the nature of the claims asserted against him, and contain a demand for judgment. This prescribed minimum is calculated to give the defendant enough information to respond to the claim, and to inform the court of what it is being asked to do to redress the alleged wrong. Except for certain enumerated claims as detailed in Rule 9, the complainant need not allege the claims with factual particularity. If he has done so, however, he is bound in his capacity as an officer of the Court to do so in good faith. The Court finds that, in this case, Rodriguez has acted in bad faith in confecting his First Amended Complaint.

This is not a conclusion that the Court reaches lightly. At the hearing to show cause, the Court extensively questioned Rodriguez, in the hope of detecting some indication---*any*

indication---that his allegations were based on ground more solid than his mind's creative faculty. This search bore no fruit. It seems that, instead of beginning with a thorough factual investigation of his client's situation and then determining what legal claims had factual support, Rodriguez decided what legal claims he wanted to bring (seeking $28 million in damages), and then set forth conclusory allegations (instead of facts) in the complaint in an attempt to support those legal claims.

When the Court asked about the City Council's supposed supervisory liability for police officer Casillas, Rodriguez explained that "in order to try to impose the policy and custom issue on the city legitimately, I had to try to allege facts, join defendants *in my mind* to accomplish that."[14] [emphasis added] Rodriguez admitted that the sum total of his pe-filing factual investigation was talking to his client and his client's wife, reading the documents in the file about Bensch's arrest, and

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[14] Tr. at 14.

watching television footage of Bensch's arrest.[15]

The Court has noted above that the Fifth Circuit mandates that "parties and their counsel must be especially diligent before filing RICO complaints, in order to avoid sanctions."[16] The Court asked Rodriguez abut his factual investigation into the RICO claim:

> THE COURT: What evidence to you have as a result of your or did you have as a result of your Rule 11 investigation that the City Council violated RICO?
>
> MR. RODRIGUEZ: Well, Your Honor, being the governing body, there are cases, I believe that I found that held that the governing body of a municipality or other local government can legitimately be joined as a party defendant in a RICO action because of the nature of the statute. It talks about an enterprise, and there has to be a governing body of that enterprise.
>
> THE COURT: So--and I'm not trying to be cute here, but are you honestly standing there with a straight face contending to all of us that the Wichita Falls City Council is a criminal enterprise or is an enterprise engaged in racketeering activity like, you know, like the Gambino family or--

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[15]Tr. at 22.

[16]Smith v. Our Lady of the Lake Hospital, 960 F.2d at 448.

MR. RODRIGUEZ: Your Honor, there are cases, I believe, that have held--

THE COURT: Forget the cases. Factually, are the doing that?

MR. RODRIGUEZ: Judge, I did not mean it in an offensive way, but you have to plead what you have to plead in order to try to bring yourself within the statute.

Tr. at 33. The Court tried again after several evasive answers:

THE COURT: What evidence did you have that they were engaged in racketeering activity?

MR. RODRIGUEZ: Well, Judge, I have tried to answer your question by telling you that it's very hard to believe, an interested observer, and I am an interested observer, it's very hard to believe that all these things can go on in the Wichita Falls Police Department and the City Council doesn't see them and do something about them.

THE COURT: So the answer would be, if you could bring yourself to say the words, is that you had no evidence that they were engaged in an enterprise engaged in racketeering activity?

MR. RODRIGUEZ: Judge, I believe that there is evidence of inaction and that constitutes evidence. Now, whether they are liable for it or not as a matter of law because they have immunity is a different matter.

Tr. at 36.

The Assistant City Attorney, Andrew Messer, explained

the harm to the City of Wichita Falls in having a baseless RICO action filed against it and the futility of the claim:

> MR. MESSER: The thing that's also troubling to me particularly is being labeled a racketeer, being sued under RICO, when I think it's clear under the local government code the City can't own property, we can't be a person. We cannot violate the RICO Act. We can't formulate the criminal intent.
>
> Case law is very clear and established that a city, at least in this Circuit, cannot do those things and cannot be sued for those things.

Tr. at 53. Rodriguez's baseless claims caused Messer and other City staff to needlessly expend City resources to defend the suit.

The Court confirmed that Rodriguez had no evidence whatsoever to substantiate the conspiracy claim he alleged against Bensch's ex-wife and the police officers named as defendants:

> THE COURT: What evidence do you have that Casillas knew that the child was lying, Mattos was lying, and just for some inexplicable reason decides they're going to set about a course of conduct of bad-rapping a fellow law enforcement officer...what evidence do you have that there was this conspiracy that you claimed?
>
> MR. RODRIGUEZ: Now, Judge, I have to keep returning to the assertion that Officer Casillas was reckless in his investigation in not challenging Penelope

Mattos and the facts of the case in a more aggressive way, in a more competent way.

THE COURT: So you investigation revealed he was negligent in the way he handled the case?

MR. RODRIGUEZ: Well, at best, negligent.

THE COURT: Well, was it something else that you have evidence of?

MR. RODRIGUEZ: I think the Fifth Circuit allows us to couch it in terms of conscious indifference or recklessness which is a high culpable mental state than negligence.

Tr. at 38-39.

Rodriguez has appealed the Memorandum Opinion and Order disposing of this case on the merits, challenging, among other things, the Court's conversion of the Defendants' motion to dismiss into a motion for summary judgment. Even if the Court erred in so converting the motion (which it didn't), it is clear from Rodriguez's answers and argument at the hearing that he filed this lawsuit without any factual basis for the legal claims he asserted. Allowing Rodriguez additional time to submit summary judgment evidence would have been a fruitless exercise, because there is no

evidence to submit. Noticeably absent from Rodriguez's arguments was any claim that he could establish a factual basis for his claims if only he had the opportunity to conduct additional discovery. Although he claims he was acting in good faith, and that he did not intend to violate Rule 11, the Court can come to no other conclusion than that he was acting unreasonably and in bad faith, with no regard for the possibility of injuring others by making baseless allegations against them. At best, Rodriguez was engaging in tactical maneuvers he thought would benefit his client. Although attorneys are duty-bound to zealously represent their client's interests, this should not be understood as *carte blanche* to expose innocents to the ravages of full-scale litigation. As the Seventh Circuit noted in *Johnson v. A.W. Chesterton Co.*, 18 F.3d 1362, 1363 (7th cir. 1994), "it [is] clear that this litigation was instigated as a gamble that something might come of it rather than on the basis of the facts at hand. It was precisely this reckless willingness to impose the burden of unwarranted litigation upon others which Rule 11 was designed to prevent."

The Sanctions Imposed

As discussed above, the Court concludes that Rodriguez made insufficient legal and factual investigation before filing this lawsuit. The Court has carefully considered the parties, the violations, and the nature of the case in formulating the appropriate sanctions to impose in this case. In this instance, *this time*, the Court concludes that a reprimand is the least severe sanction that would adequately deter Rodriguez from violating Rule 11 in the future.

The Court spent many hours reviewing the lawsuit, writing the Memorandum Opinion and Order disposing of the case, preparing for the sanctions hearing, holding the hearing, and writing this Memorandum Opinion and Order. Every moment of that time was time wasted. The Defendants, the community leaders and police officers of the City of Wichita Falls, had extremely serious allegations made against them to the tune of $28 million in claimed damages, none of which had any legal or factual basis. They spent time and money defending the charges,

in addition to enduring the heightened media scrutiny that resulted from the filing of the lawsuit. Rodriguez is hereby placed on notice that the Court will not countenance similar conduct in the future. While a $150 filing fee may seem an inexpensive way to get publicity for your firm by getting on the 6 o'clock news for claiming virtually every elected official in town is a racketeer, this Court will not put up with it.

Rodriguez argued at the hearing that "sanctionable conduct should be limited to instances where the Court finds that there has been willful or intentional misconduct on the part of counsel or a party,"[17] and that he should not be sanctioned because his filing of legal claims which were totally without foundation was simply due to incompetence, and not bad faith.[18] Once again, this argument is legally unfounded. An attorney's affirmative duties under Rule 11 are measured under an objective, not subjective, standard of reasonableness under the circumstances, and an

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[17]Tr. at 10.

[18]Tr. at 63-64.

attorney's good faith will not protect him from Rule 11 sanctions. *Childs v. Sate Farm Mutual Automobile Ins. Co.*, 29 F.3d 1028, 1024 (5th cir. 1994). As the Fifth circuit recently commented in a decision affirming Rule 11 sanctions when an attorney pursued claims unquestionably barred by well-settled law:

> Rule 11 is not intended to stifle creative advocacy or to chill an attorney's enthusiasm in pursuing factual or legal theories. But just as not every combination of chords constitutes a song, not every argument that the law should be otherwise counts as creative advocacy. [The attorney's] pleadings do not argue for the modification of the law limitations; they do not suggest novel legal theories or a creative interpretation of a changing area of the law. The claims either rest on poor legal research, bad faith, or both.

Merriman, 100 F.3d at 1194. The Court specifically finds that the legally meritless claims in this case rest on Rodriguez's admittedly poor legal research as well as bad faith. Trusting that "a word to the wise is sufficient," the Court cautions Rodriguez that future Rule 11 violations *shall* result in more severe sanctions.

CONCLUSION

As discussed above, the Court finds that Plaintiff's counsel Rosendo Rodriguez violated Rule 11 in the filing and prosecution of this lawsuit. Although the Court declines to impose a monetary sanction for Rodriguez's actions, the Court hereby reprimands Rodriguez for his failure to make a sufficient legal and factual investigation before filing this lawsuit, and cautions Rodriguez that further Rule 11 violations *shall* result in more severe sanctions.

SO ORDERED this 18th day of September, 1997.

/s/ Joe Kendall
Joe Kendall
U.S. District Judge